

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND	)	
PROFESSIONAL REGULATION,	)	
CONSTRUCTION INDUSTRY	)	
LICENSING BOARD,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case Nos. 98-3713
	)	99-2654
BRUCE E. ESQUINALDO, JR.,	)	99-2655
	)	
Respondent.	)	
_____	)	

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in these cases on October 11 and 12, 1999, and April 6 and 7, 2000, in Miami, Florida, before Patricia Hart Malono, the duly-designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Diane Snell Perera, Esquire  
Department of Business and  
Professional Regulation  
401 Northwest Second Avenue  
Suite N-607  
Miami, Florida 33128

For Respondent: Wellington F. Meffert, II, Esquire 1/  
301 South Bronough Street  
Suite 200  
Tallahassee, Florida 32301

STATEMENT OF THE ISSUE

Whether the Respondent committed the violations alleged in the Administrative Complaints dated June 3, 1998, and December 23, 1998, and, if so, the penalty that should be imposed.

PRELIMINARY STATEMENT

In a two-count Administrative Complaint dated June 3, 1998, the Department of Business and Professional Regulation ("Department"), Construction Industry Licensing Board ("Board"), charged Bruce E. Esquinaldo, Jr., as qualifier of Challenger Pools, Inc., with two violations of Section 489.129(1), Florida Statutes (Supp. 1996), with respect to construction of a swimming pool on the property of Irving Jovellar. Specifically, the Department charged Mr. Esquinaldo with having violated Section 489.129(1)(k), Florida Statutes (Supp. 1996), by abandoning a construction project and with having violated Section 489.129(1)(p), Florida Statutes (Supp. 1996), by knowingly violating local building codes. Mr. Esquinaldo timely requested an administrative hearing, and the Department transmitted the matter to the Division of Administrative Hearings for assignment of an administrative law judge. The case was assigned DOAH Case No. 98-3713. At the hearing, the Department dismissed Count II of the Administrative Complaint dated June 3, 1998.

In a three-count Administrative Complaint dated December 23, 1998, the Board charged Bruce E. Esquinaldo, Jr., as qualifier of Challenger Pools, Inc., with three violations of Section 489.129, Florida Statutes (Supp. 1996), with respect to construction of a swimming pool on the property of David Casadona. Specifically, the Department charged Mr. Esquinaldo with having violated Section 489.129(1)(k), Florida Statutes (Supp. 1996), by abandoning a construction project; with having violated Section 489.129(1)(n), Florida Statutes (Supp. 1996), by failing to satisfy minimum industry standards and, thereby, committing incompetency in the practice of contracting; and with having violated Section 489.129(1)(p), Florida Statutes (Supp. 1996), by failing to obtain passing final inspections. Mr. Esquinaldo timely requested an administrative hearing, and the Department transmitted the matter to the Division of Administrative Hearings for assignment of an administrative law judge. The case was assigned DOAH Case No. 99-2654.

In a three-Count Administrative Complaint dated December 23, 1998, the Board charged Bruce E. Esquinaldo, Jr., as qualifier of Challenger Pools, Inc., with three violations of Section 489.129, Florida Statutes (Supp. 1996), with respect to construction of a swimming pool on the property of Jameel Quadri. Specifically, the Department charged Mr. Esquinaldo with having violated Section 489.129(1)(k), Florida Statutes

(Supp. 1996), by abandoning a construction project; with having violated Section 489.129(1)(n), Florida Statutes (Supp. 1996), by failing to satisfy minimum industry standards and, thereby, committing incompetency in the practice of contracting; and with having violated Section 489.129(1)(p), Florida Statutes (Supp. 1996), by failing to obtain passing final inspections. Mr. Esquinaldo timely requested an administrative hearing, and the Department transmitted the matter to the Division of Administrative Hearings for assignment of an administrative law judge. The case was assigned DOAH Case No. 99-2655.

DOAH Case Nos. 98-3713, 99-2654, and 99-2655 were consolidated by order entered July 14, 1999. Pursuant to notice, a final hearing was conducted on October 11 and 12, 1999. It was not possible to conclude the hearing on October 12, 1999, and a continuation of the hearing was scheduled for February 29 and March 1, 2000. Counsel for the Respondent was given leave to withdraw in an order entered January 4, 2000, and, in order to allow new counsel time to prepare for hearing, a continuance was granted, and the hearing rescheduled in an order entered February 24, 2000. Pursuant to notice, the continuation of the final hearing was conducted on April 5 and 6, 2000.

At the final hearing, the Department presented the testimony of the following witnesses in DOAH Case No. 98-3713:

Renee Smouse, Michael Sprovero, and Irving Jovellar. The Department presented the testimony of the following witnesses in DOAH Case No. 99-2654: David Casadona, Thomas J. Willi, Philip A. Boyd, John Pasquale Pompilio, and Bruce Rogers. The Department presented the testimony of the following witnesses in DOAH Case No. 99-2655: Jameel Quadri, Michael D. Fauver, Michael A. Barabas, Lamar A. Vetter, and Gilbert Curry, Jr. The Department presented the testimony of Calvin B. Eden, who was qualified as an expert witness, in all three cases. Petitioner's Exhibits 1 through 32 were offered and received into evidence.

With respect to all three cases, the Respondent presented the testimony of the following witnesses: Bruce E. Esquinaldo Jr.; Theodore Duane Camburn; Caryn Ruth Breed; Jeffrey T. Burley; Gary Weston; Bruce Esquinaldo, Sr.; Robert Karrh; and Frank J. Deizaguirre, who was qualified as an expert witness and whose testimony was presented by deposition. Respondent's Exhibits 1 through 3 and 4 through 9 were offered and received into evidence.

The last three volumes of the seven-volume transcript of the proceedings were filed with the Division of Administrative Hearings on April 20, 2000, and the parties timely filed proposed findings of fact and conclusions of law, which have been considered.

FINDINGS OF FACT

Based on the oral and documentary evidence presented at the final hearing and on the entire record of this proceeding, the following findings of fact are made:

1. The Department is the state agency responsible for investigating and prosecuting complaints made to the Department for violations of Chapter 489, Part I, Florida Statutes. Sections 489.131(7)(e) and 455.225, Florida Statutes (1997). Pursuant to Section 489.129(1), Florida Statutes (1997), the Construction Industry Licensing Board ("Board") is the entity responsible for imposing discipline for any of the violations set forth in that section.

2. At all times material to these proceedings, Mr. Esquinaldo was a licensed swimming pool contractor, having been issued license number CPC050527 by the Board, and he was the qualifying contractor for Challenger Pools, Inc. ("Challenger Pools"). Mr. Esquinaldo has been a licensed swimming pool contractor since 1987. In that time, Mr. Esquinaldo has been cited by the Department once, in June 1992, and Mr. Esquinaldo paid an administrative fine of \$50.00 for the violation, which was failure to obtain a final inspection after completing a swimming pool.

3. At the times material to these proceedings, Challenger Pools had several offices in south and central Florida, and

built approximately 1,500 pools each year. Mr. Esquinaldo was the only qualifier for the company.

4. The building code that governed each of the projects at issue herein was the South Florida Building Code, 1996 Edition. This Code required a number of inspections: For the structural portion of the pool, three inspections were required: the pool steel, the pool deck, and the final inspection. For the plumbing portion of the pool, three inspections were required: the main drain, pool piping, and the final inspection. For the electrical portion of the pool, three inspections were required: the electrical grounding of the steel structure, the pool deck grounding, and the final inspection. In addition, a final inspection was required for any fencing to be installed. It is the responsibility of the pool contractor to call for the required inspections for work over which it has responsibility.

5. The South Florida Building Code, 1996 Edition, also provided that building permits, including permits for the construction of swimming pools, would expire if 180 days elapsed without the contractor calling for an inspection.

6. It is not unusual in the pool contracting industry for inspections to reveal code violations. The contractor is, however, expected to correct the violations and any other deficiencies noted in the inspection reports.

7. During the times material to these proceedings, it was the policy of Challenger Pools that, whenever a customer threatened a lawsuit or filed a lawsuit, it would stop work immediately on the customer's pool and it would cease all direct communications with the customer. Work would recommence at the direction of Challenger Pools' attorney. This policy was adopted on the advice of Challenger Pools' attorney.

DOAH Case No. 98-3713 - Irving Jovellar

8. On May 7, 1996, Challenger Pools, Inc., and Irving Jovellar entered into a Swimming Pool Construction Agreement for the construction of a swimming pool and spa at 188 Truxton Drive, Miami Springs, Florida. Addenda to the agreement were executed on June 6 and 22, 1996, and on September 6, 1996. The contract price was \$14,000.00, with \$1,600.00 added pursuant to the September 6, 1996, addendum. The full contract price of \$15,600.00 was paid by Mr. Jovellar, and the check for the final payment was processed by the bank on October 2, 1996. 2/

9. On June 11, 1996, Challenger Pools applied to the City of Miami Springs, Florida, for a building permit for the pool. Challenger Pools began work on Mr. Jovellar's pool on June 13, 1996, and the swimming pool, plumbing, and electric permits were issued on July 12, 1996.

10. Challenger Pools worked on Mr. Jovellar's pool throughout the summer of 1996. The steel installation was



approved on July 19, 1996, and the slab was approved September 12, 1996. The pool was plastered on September 28, 1996, and the pool was filled with water and operating on September 30, 1996.

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11. In a letter dated September 26, 1996, Mr. Jovellar's attorney notified Challenger Pools that the gate to Mr. Jovellar's fence had been damaged during the pool excavation and that Mr. Jovellar expected to be compensated for the damage. Challenger Pools advised Mr. Jovellar that the excavator, Tom Waters, was responsible for the damage and that he should look to Mr. Waters for compensation. Mr. Jovellar filed suit against Mr. Waters in small claims court, served Mr. Waters in early February 1997, and recovered approximately \$450.00 in damages from Mr. Waters.

12. Mr. Jovellar's pool did not pass the plumbing final inspection dated November 8, 1996, because the pool heater was not properly installed.

13. Challenger Pools renewed the structural and plumbing permits on July 24, 1997.

14. In a letter dated October 30, 1997, Mr. Jovellar's attorney notified Challenger Pools that, if it did not correct the defects in the swimming pool, suit would be filed against Challenger Pools. Challenger Pools responded in a letter dated November 6, 1997, that it was prepared to correct the problems

with the pool. Challenger Pools further advised that, because the pool permits had expired, it would apply to renew the permits so that work could begin.

15. Challenger Pools renewed the structural, plumbing, and electrical permits on January 19, 1998. Challenger Pools went back to work on Mr. Jovellar's pool in January 1998.

16. The next inspections of Mr. Jovellar's pool took place between July 15, 1998, and January 6, 1999, the date on which the pool passed its final inspection.

17. Notwithstanding the plumbing inspection conducted on November 8, 1996, and the permit renewal on July 24, 1997, Mr. Esquinaldo testified that, on the advice of its attorney, Challenger Pools ceased work on Mr. Jovellar's swimming pool in early October 1996, when it received the September 26, 1996, letter from Mr. Jovellar's attorney regarding the broken fence gate.

18. On the basis of Mr. Esquinaldo's testimony, it is established that Challenger Pools ceased work on Mr. Jovellar's pool in early October 1996. The evidence also establishes that work recommenced in early 1998. Accordingly, Challenger Pools failed to work on Mr. Jovellar's pool for a period in excess of 90 consecutive days between October 1996 and January 1998. The evidence further establishes that Challenger Pools ceased work because Mr. Jovellar threatened a lawsuit to recover damages for

repair of a fence damaged by the person who excavated the pool. Under the circumstances, the threatened lawsuit did not constitute just cause for Challenger Pools' failure to work on Mr. Jovellar's pool between October 1996 and January 1998 even though Challenger Pools stopped work on the advice of its attorney; Challenger Pools advised Mr. Jovellar to proceed against the excavator to recover for the damages to the fence, which Mr. Jovellar did in early 1997. The Department did not present evidence sufficient to establish that Challenger Pools failed to work on Mr. Jovellar's pool for 90 consecutive days subsequent to January 1998.

19. As of October 6, 1999, the Department had expended \$160.52 in investigative costs and \$2,433.90 in prosecutorial costs with respect to Mr. Jovellar's complaint.

DOAH Case No. 99-2654 - David Casadona

20. On September 30, 1996, Challenger Pools entered into a Swimming Pool Construction Agreement with David Casadona for construction of a residential swimming pool at 14910 Southwest 70th Place, Davie, Florida. The full contract price was \$9,000.00, and Mr. Casadona made the final payment on the pool in March 1997.

21. Mr. Casadona was building a house at this address, and, a representative of Challenger Pools advised Mr. Casadona

that construction on the swimming pool would begin after construction on the house was completed.

22. Mr. Casadona moved into the new house on November 6, 1996, and Challenger Pools began excavating the pool approximately a week and a half later, in mid-November 1996.

23. Challenger Pools submitted applications to the Town of Davie for the electrical, plumbing, and structural permits for Mr. Casadona's pool on November 19, 1996. The permits to construct the swimming pool were issued on January 2, 1997.

24. Mr. Casadona contracted separately for installation of a fence around the pool, and, pursuant to the agreement between Mr. Casadona and Challenger Pools, Mr. Casadona was responsible for ensuring that the fence met local building codes. Challenger Pools was not licensed to install fences, and the installation of a fence was not included in any of Challenger Pools' swimming pool construction agreements. The permit for the fence was issued January 2, 1997.

25. The Town of Davie conducted a special inspection of Mr. Casadona's property on December 18, 1996, before the permits were issued for construction of the pool, to determine whether a fence existed on the property and the height of the fence, if one existed. At that time, the inspector discovered that the pool had already been excavated and that the rebar was in place. The inspector also noted that part of the footer for the rear

patio of the house had been undermined. A permit is required before a pool is excavated, but it is not unusual for a pool contractor to begin excavation before the permit is issued.

26. An inspection of the plumbing pool main drain was conducted on January 3, 1997, and approved without comment.

27. An inspection of the electrical pool grounding was conducted on January 3, 1997, and approved without comment.

28. An inspection of the structural pool steel was conducted on January 6, 1997. The pool steel was approved with an exception. The inspector noted that an area under the existing structure had been undermined, and Challenger Pools was directed to pour the gunnite for the pool as soon as possible and to consult an engineer for directions on how to return the existing structure to its original specifications. The inspector further required that an engineer provide certification that the existing structure had proper support in the area in which it was undermined. The face of the footer under the structure was exposed, and the earth underneath the structure was undermined about three or four inches; the undermining did not threaten the integrity of the existing structure.

29. An inspection of the plumbing pool piping was conducted on January 16, 1997, and approved without comment.

30. An inspection of the electrical pool deck bonding was conducted on January 27, 1997, and disapproved with the comment that all metal within 5 feet of the water must be bonded.

31. An inspection of the structural pool deck steel was conducted on January 27, 1997, and disapproved with the comment that the item was not ready for inspection because the form boards were not completed.

32. The electrical pool deck bonding was inspected on February 3, 1997, and approved without comment.

33. The structural pool deck steel was inspected on February 4, 1997, and approved without comment.

34. Challenger Pools worked on Mr. Casadona's pool from November 1996 through March 1997, when Challenger Pools applied the plaster to the pool and filled the pool with water. Once the pool was filled, Mr. Casadona began using the pool. Because Mr. Casadona had not installed the fence when Challenger Pools plastered the pool and filled it with water, Challenger Pools created a temporary enclosure for the pool by surrounding the pool with an orange plastic barrier.

35. A plumbing pool final inspection was conducted on April 15, 1997, and disapproved because no approved plans or permit cards were available on-site.

36. An electrical pool final inspection was conducted on April 15, 1997, and disapproved with the comment that no approved plans or permit cards were available on the site.

37. Between April 1997 and October 1997, Challenger Pools corrected the violations noted on the inspection reports and made several service calls to work on Mr. Casadona's pool. By October 1997, Mr. Casadona had installed the required fence, but the gate was not in compliance with the South Florida Building Code.

38. Challenger Pools requested a replacement set of plans for Mr. Casadona's pool on October 3, 1997, and they were provided on October 7, 1997.

39. A plumbing pool final inspection was conducted on October 8, 1997. The work was disapproved because the pool's main drain was missing one screw.

40. On October 8, 1997, an electrical pool final inspection was conducted. The electrical work was disapproved with seven comments identifying violations of the National Electric Code, as follows:

- (1) NEC 110-3B Listed and labeled (insulate unused lead)
- (2) NEC 680-22(a)-(1) Bond all metal within 5' x 12' (must see bond at handrail)
- (3) NEC 110-16(a) Working clearance at service and controller
- (4) NEC 680-20-B-1 Must see potting compound

- (5) NEC 680-6(A)(2)+(3)+(1), Receptacle  
(B)-(1), Light
- (6) NEC 680-10 UG. wiring not permitted  
within 5' of pool
- (8) [sic] Speaker wire not approved

Item (1) refers to insulating the unused leads on the pool light. Item (2) refers to the lack or apparent lack of bonding on a handrail installed in the pool deck. Item (3) refers to the requirement that there be sufficient working clearance in front of the pump controller, which is a time switch transformer; with respect to this item, a hedge had been planted in front of the pool pump and filter by someone other than Challenger Pools, the shrubs blocked access to the pump controller, and Mr. Casadona refused to move the shrubs. Item (4) refers to the requirement that potting compound be used in the wet light niche in the pool to prevent the chemicals in the water from corroding the ground bonding connection; with respect to this item, Richard Boyette, a licensed professional engineer, certified in a letter to the Town of Davie dated April 3, 1998, that potting compound had been properly placed in the lighting niches in the pool. Item (6) refers to wiring being installed within 5 feet of the pool. Item "(8)" refers to speaker wires that are not allowed in the pool area. With respect to items (6) and "(8)", the violations were not the responsibility of Challenger Pools because they related to wiring for Malibu



lights and two speakers installed by someone other than Challenger Pools.

41. A structural pool deck final inspection was conducted on October 8, 1997, and approved without comment.

42. A structural pool steel inspection was conducted on October 8, 1997, and disapproved with the comment that the pool had been completed without a pool steel inspection. In a letter dated April 3, 1998, Richard Boyette, a licensed professional engineer, certified to the Town of Davie that the pool steel had been properly placed according to the permit plans.

43. A structural fence final inspection was conducted on October 8, 1997, and disapproved with the comment that "all fences and gates must be 5' high for yards with pools." The fence contractor was identified in the inspection report as Cercas Isla - Island Fence.

44. Challenger Pools did not call for any inspections on Mr. Casadona's pool after it corrected the deficiencies noted in the October 1997 inspection reports until January 1999 because Mr. Casadona did not correct the violations for which he was responsible, that is, the fence gate height, the shrubs in front of the pool pump, and the electrical wires for the Malibu lights and speakers. Mr. Casadona was aware of these violations as a result of the October 8, 1997, inspection reports.

45. Mr. Casadona and Challenger Pools' personnel were in regular contact during the October 1997 to January 1999 hiatus. Challenger Pools repeatedly asked Mr. Casadona to correct the fence gate height so that a structural pool final inspection could be approved and to remedy the electrical violations for which he was responsible. Challenger Pools let the situation remain unresolved because, on the basis of conversations Challenger Pools' personnel had with Mr. Casadona, there was no reason to believe that Mr. Casadona would not cooperate and correct the deficiencies.

46. As of January 1999, Mr. Casadona had not made the required corrections. He did, however, file a complaint with the Department. At that time, Challenger Pools' attorney advised the company to finish Mr. Casadona's pool and close out the permit. Based on this advice, Challenger Pools renewed the permits and called for the final inspections.

47. A plumbing pool final inspection was conducted on January 25, 1999, and approved without comment.

48. A structural fence final inspection was conducted on January 25, 1999, and disapproved with the comment that "[t]here is no reference to a fence anywhere in the pool plans. The front gate is not self closing, self latching and is about 6" from being the 5' height [sic] requirement."

49. An electrical pool final inspection was conducted on March 9, 1999, and disapproved with the comment that "working clearance violated at pump controller." The electrical final inspection was disapproved because Mr. Casadona would not remove the shrubs he had planted in front of the pool pump.

50. An electrical pool final inspection was conducted on March 22, 1999, and approved, but the inspection report contained the comment that "working clearance violated at pump controller."

51. A structural pool deck final was conducted on March 24, 1999, and approved with a comment that it had already been approved by another inspector.

52. A structural fence final inspection was conducted on March 24, 1999, and disapproved with the comment that the fence was "not ready[;] the gate and latch are not 5' high."

53. A structural fence final inspection was conducted on March 26, 1999, and rejected because the gate was not 5 feet high and was not self-closing and self-latching, as required by ordinance. The inspector also noted that no plan or permit for the fence was posted on the property and that no one was at home at the time of the inspection.

54. A structural pool steel inspection was conducted on March 31, 1999, and disapproved because no one was at home and

neither the plans nor the permit cards were posted. The inspector noted, however, that the pool was completed.

55. In a letter to the Town of Davie dated February 18, 1999, and received by the Town of Davie on April 12, 1999, Mr. Boyette stated that the "steel and main drain inspection was bypassed due to a lack of communication on the above referenced pool. However, steel and main drain were in per code."

56. An electrical pool final inspection was conducted on April 14, 1999, and disapproved with the comments "disconnect required for pump motor ahead of controller" and "unused transformer tap to be insulated at connection end." These were two items that the electrical inspector did not catch during the March 22, 1999, inspection.

57. A structural pool final inspection was conducted on April 19, 1999, and was approved with the comments that the engineer's letter should be consulted regarding the missed pool steel inspection. A note was made in the report of the structural pool final inspection conducted on April 19, 1999, stating "Fence Final" with the comment that the fence and wall and existing front gate were 5 feet high and self-closing and self-latching.

58. The permit for Mr. Casadona's pool was closed out by the Town of Davie Building Division on April 19, 1999, when the structural pool final inspection was approved.

59. After the inspections conducted in October 1997, Challenger Pools corrected the violations noted in the inspection reports for which it was responsible.

60. Challenger Pools did not do any work on Mr. Casadona's pool after it corrected the violations noted in the October 1997 inspection reports because it considered its work on the pool complete.

61. The violations noted in the inspection reports for Mr. Casadona's pool were not unusual for the industry and were relatively minor. Challenger Pools corrected all of the violations and deficiencies noted in the inspection reports for Mr. Casadona's pool.

62. The evidence presented by the Department is not sufficient to establish with the requisite degree of certainty that Challenger Pools failed to work on Mr. Casadona's pool for 90 consecutive days during the period from March 1997 until October 1997. However, the evidence presented is sufficient to establish with the requisite degree of certainty that Challenger Pools failed to work on Mr. Casadona's pool for 90 consecutive days during the period from October 1997 until January 1999. Challenger Pools could have done more to encourage Mr. Casadona to correct the height of his fence gate, remove the shrubs from around the pump controller, and remove the prohibited electrical wiring around the pool. Nonetheless, Challenger Pools had just

cause to cease work on Mr. Casadona's pool because Challenger Pools could have reasonably concluded that its work on the pool was completed and that the only things remaining to be corrected were items for which Mr. Casadona was responsible. All of the violations noted on the inspection reports from January 1999 through April 1999 were the responsibility of Mr. Casadona with the exception of two minor code violations noted in the electrical pool final inspection conducted April 14, 1999, which violations were corrected by Challenger Pools prior to April 19, 1999.

63. The evidence presented by the Department is not sufficient to establish with the requisite degree of certainty that the work Challenger Pools did on Mr. Casadona's pool was below industry standards. 4/

64. The evidence presented by the Department is sufficient to establish with the requisite degree of certainty that Challenger Pools commenced construction on Mr. Casadona's pool before the Town of Davie issued a building permit. The evidence presented by the Department is not sufficient, however, to establish with the requisite degree of certainty that Challenger Pools worked on Mr. Casadona's pool without having obtained the proper inspections. The inspection history establishes that, notwithstanding the notations on subsequent inspection reports, both the pool main drain and the pool steel were approved on

January 3, 1997, and January 6, 1997, respectively. In addition, Challenger Pools called for final inspections of the plumbing, electric, and structural components of the pool on October 8, 1997, and again in January 1999, and closed out the permit on April 19, 1999.

DOAH Case No. 99-2655 - Jameel Quadri

65. On August 15, 1995, Challenger Pools entered into a Swimming Pool Construction Agreement with Jameel Quadri for construction of a residential swimming pool and spa at 239 Landings Boulevard, Fort Lauderdale, Florida. The full contract price was \$12,240.00.

66. Mr. Quadri was building a house on the property, and the agreement between Challenger Pools and Mr. Quadri provided that construction of the pool would not start until construction on the new house was completed.

67. On October 3, 1996, Challenger Pools and Mr. Quadri entered into a contract addendum to the agreement that provided for the addition of brick pavers, a screen enclosure, and electrical work for the screen enclosure. The price of the additional items was \$7,860.00. Mr. Quadri made the final payment on the pool agreement and addendum in April 1997.

68. The applications for the building, screen enclosure, plumbing, and electrical permits for Mr. Quadri's swimming pool and spa were received by the Broward County Building and

Permitting Department on October 15, 1996, and the permits were issued on October 29, 1996. The building, screen enclosure, and plumbing permits were issued to Challenger Pools as the contractor; and the electrical permit was issued to Specialty Device Installers. Even so, Challenger Pools remained responsible for the electrical work on the pool because it was included in the agreement. The permits were based on the plans for construction submitted with the permit applications, including the plans for the spa and the pool deck.

69. Challenger Pools began construction on Mr. Quadri's pool on October 25, 1996, when the pool was excavated.

70. A plumbing pool and spa main drain inspection was conducted on October 31, 1996, and was disapproved because the work was not ready for inspection and no safety railing had been installed around the excavation.

71. An electrical pool grounding inspection was conducted on October 31, 1996, and disapproved for several reasons.

72. A structural pool steel inspection was conducted on October 31, 1996, and disapproved for several reasons.

73. The plumbing pool main drain was inspected on November 15, 1996, and disapproved because no Notice of Commencement had been recorded and because the safety fence was not completely around the pool.



74. The electrical pool grounding was inspected and approved on November 15, 1996.

75. The structural pool steel was inspected on November 15, 1996, and disapproved because of unsafe conditions, with the comment that safeguards were required.

76. The plumbing pool and spa main drains were inspected on November 20 1996, and disapproved because the pool and spa main drains had only 38 and 33 pounds of pressure, respectively, when the code requires 40 pounds.

77. The plumbing pool and spa main drains were inspected and approved on November 26, 1996.

78. The structural pool steel was inspected on November 26, 1996, and approved.

79. A plumbing pool piping inspection was conducted on December 9, 1996, and disapproved because the piping was not properly bedded, the dirt on the job site was not proper clean fill, and the piping was "within the angle of repose."

80. The plumbing pool piping was inspected on December 20, 1996, and disapproved because the piping was not properly bedded.

81. The plumbing pool piping was inspected and approved on December 24, 1996.

82. An electrical pool deck grounding inspection was conducted on February 20, 1997, and disapproved for several reasons.

83. A structural pool deck inspection was conducted on February 20, 1997, and disapproved for several reasons.

84. The electrical pool deck grounding was inspected and approved on February 28, 1997.

85. The structural pool deck was inspected and approved on February 28, 1997.

86. Challenger Pools worked steadily on the pool until it was plastered on April 21, 1997, and filled with water.

87. In April and May 1997, Challenger Pools received several telephone calls from Mr. Quadri regarding problems with his pool. In May 1997, Mr. Quadri called an attorney and asked that the attorney write a letter to Challenger Pools regarding what Mr. Quadri perceived were problems with the pool construction. In a letter dated May 22, 1997, Mr. Quadri's attorney identified the problems as follows:

The deck area is not level, causing the pavers to break. The vacuum system has never been delivered or installed. The underwater pool light is dangling from its fixture and has exposed wires sitting in the water. The spa and jets do not work. The waterfall does not work. There are open and exposed wires at the pump. One of your trucks damaged the right side corner of Mr. Quadri's house and that condition has not been repaired. The ceramic underwater

handles on the exterior of the spa are the wrong color. Mr. Quadri was promised white handles and you installed grey ones.

The "exposed wires" mentioned in reference to the pool light were designed to be submerged in water, and the "exposed wires" at the pump were bonding wires running from the timer to the pump.

88. Mr. Quadri's attorney notified Challenger Pools in the May 22, 1997, letter that, unless the defects identified in the letter were corrected within ten days of the date of the letter, Mr. Quadri would file suit against Challenger Pools for breach of contract. Challenger Pools did not respond to the letter of May 22, 1997, and no one from Challenger Pools came to the property to work on the pool and spa in response to that letter.

89. In accordance with company policy, Challenger Pools ceased working on Mr. Quadri's pool and spa when it received the May 22, 1997, letter from Mr. Quadri's attorney threatening a lawsuit.

90. In a letter dated August 14, 1997, Mr. Quadri's attorney sent Challenger Pools a letter demanding treble damages for theft arising out of the failure of Challenger Pools to complete Mr. Quadri's pool and spa after having been paid in full.

91. In August 1997, at the request of Challenger Pools' attorney, Challenger Pools' vice president, Tom Camburn, and

Challenger Pools' Fort Lauderdale field supervisor visited Mr. Quadri's property to view the pool and spa. Mr. Camburn and the field supervisor were in the vicinity of Mr. Quadri's pool for only 10 to 15 seconds before Mr. Quadri came out of the house and told them to leave the property, asserting that he was going to sue Challenger Pools. During those few seconds, Mr. Camburn observed that there was water in the pool and that some of the pavers forming the pool deck were sunken. He did not measure the pool and spa to determine if they were larger than represented in the original plans, although he did note that the pool and deck were larger than Challenger Pools usually builds.

92. Challenger Pools' attorney responded to the August 14, 1997, letter with a letter dated August 20, 1997, advising Mr. Quadri's attorney of the outcome of the visit to Mr. Quadri's property and advising him that Challenger Pools would not go back to Mr. Quadri's property to inspect and repair any legitimate warranty complaints unless Mr. Quadri paid Challenger Pools a reasonable amount for the larger pool and spa.

93. Challenger Pools based its contention that Mr. Quadri received a larger pool and spa than that specified in his contract on the fact that the invoice received for the pavers used in the pool deck was much higher than expected and showed that many more pavers were delivered to Mr. Quadri's property than were included in the original plans for Mr. Quadri's pool

deck. The pavers were added to the contract in the addendum executed October 3, 1996, but neither the size of the deck nor the number of pavers was shown in the contract or in the addendum. 5/ In addition, no Change of Plans form was filed with the Broward County Building and Permitting Department indicating that there were any deviations from the original construction plans in the construction of Mr. Quadri's pool and spa, and no deviations from the original construction plans were noted by any of the building inspectors who conducted inspections of Mr. Quadri's pool and spa.

94. In a notice dated August 27, 1997, Mr. Quadri was advised by the Broward County Building and Permitting Department that the permit for his pool and spa had expired. These notices are routinely sent by the Broward County Building and Permitting Department to both the property owner and the contractor when 150 days have elapsed without an inspection having been requested. The notice advises the property owner and the contractor that the permit will expire 30 days from the date of the notice. Challenger Pools did not receive a copy of the notice.

95. Mr. Quadri renewed the permits on September 12, 1997, to avoid the penalties set forth in the notice; Challenger Pools continued to be named as contractor on the permits.

96. A plumbing pool final inspection was conducted on September 15, 1997, and disapproved, with the comments that the main drain grid required two screws; 6/ the spa water level was low, possibly because of a leak; and the pavers were sinking around the spa.

97. An electrical pool final inspection was conducted on September 15, 1997, which was disapproved, with comments that the pool screen was not bonded; the pool light was not in place; a bonding wire on the pool pump needed to be covered; and "[s]ealtite to pump motor in grass," meaning that the flexible electric conduit running from the timer/transformer subpanel to the pool pump was lying in the grass. No unsafe conditions were noted on the inspection report.

98. A structural pool final inspection was conducted on September 15, 1997, and rejected, with the comments that there had been no final approval of the pool plumbing and electrical; that the paver deck was washed out in numerous places and needed to be repaired; that the riser at the rear steps was not to code; that the handholds were missing; and that the exterior wall of the raised spa needed finishing.

99. Challenger Pools had installed ceramic underwater handholds on the pool, but Mr. Quadri was not satisfied with them because they were gray in color rather than white, the

color he had selected. Challenger Pools did not remove the handholds.

100. Neither Mr. Quadri nor Challenger Pools called for the inspections of Mr. Quadri's pool conducted on September 15, 1997. Rather, those inspections were apparently triggered by the renewal of the permits.

101. Mr. Quadri did not file suit against Challenger Pools, but, by letter dated December 12, 1997, Mr. Quadri notified the Department that Challenger Pools had abandoned construction on his pool and spa and that the pool and spa still had numerous defects.

102. After Challenger Pools received notice of the complaint filed by Mr. Quadri with the Department, Challenger Pools was advised by its attorney to obtain final inspections on Mr. Quadri's pool.

103. An electrical pool final inspection was conducted on March 17, 1998, and disapproved because the screen enclosure needed to be bonded on both sides of the column.

104. An electrical pool final inspection was conducted on March 27, 1998, and approved.

105. A plumbing pool final inspection was conducted on October 9, 1998, and disapproved because the building permit had expired, the equipment was defective in that there was a cracked filter, and the equipment needed to be anchored. 7/

106. A structural pool final inspection was conducted on October 9, 1998, and disapproved because the permit had expired, and because of damaged sidewalks, no handholds, and a problem with a stairway.

107. A plumbing pool final inspection was conducted on November 6, 1998, and disapproved because the permit card was not displayed on the site.

108. Challenger Pools renewed the permits for Mr. Quadri's pool on November 16, 1998.

109. A structural pool final inspection was conducted on November 20, 1998, and disapproved because the permit card was not at the site.

110. A structural pool final inspection was conducted on November 30, 1998, and disapproved because of "previous inspections" and because the marcite was coming off and stucco was needed around the steps.

111. A structural pool final inspection was conducted on December 3, 1998, and approved.

112. A plumbing pool final inspection was conducted and approved on December 7, 1998.

113. The Certificate of Occupancy for Mr. Quadri's swimming pool and spa was issued by the Broward County Building and Permitting Department on December 8, 1998.



114. At the time of the final hearing, the pavers around Mr. Quadri's pool were uneven and sinking. Pavers are used for pool decks instead of concrete because concrete cracks as the earth beneath the deck settles. They are set on sand and are not grouted but, rather, are locked in with fine sand. It is not uncommon for paver decks to settle because strong rains can wash out the sand under the deck and cause erosion. As a result, pavers will sink or lift as the earth underneath shifts. The degree to which a paver deck shifts varies.

115. Pressure washing a paver deck can cause the sand beneath the pavers to erode and shift, which causes the pavers to sink and lift. Mr. Quadri has cleaned the pavers around his pool and spa with a pressure cleaner at least every six months since it was installed.

116. The evidence presented by the Department is sufficient to establish that Challenger Pools did not work on Mr. Quadri's pool between the end of April 1997 and March 1998 and between the end of March 1998 and October 1998. Challenger Pools may have been justified when it ceased work on Mr. Quadri's pool after the May 22, 1997, letter from Mr. Quadri's attorney threatening a lawsuit if the enumerated defects with the pool were not corrected. It was not justified, however, in failing to perform work on Mr. Quadri's pool after August 20, 1997; the evidence presented by Challenger Pool to justify the

statement in the August 20, 1997, letter that it would not correct the problems with Mr. Quadri's pool until Mr. Quadri paid a "reasonable amount for the larger pool and spa he received" is not sufficient to establish that the pool and spa was, indeed, larger than the one for which Mr. Quadri contracted. In addition, Challenger Pools was not justified in failing to perform work on Mr. Quadri's pool between March 27, 1998, when the electrical pool final inspection was approved, and October 1998, because its attorney, in response to the December 1997 complaint to the Department, advised it to obtain final inspections and close out the permit. Accordingly, the evidence presented is sufficient to establish with the requisite degree of certainty that Challenger Pools failed to perform work on Mr. Quadri's pool for a period of 90 consecutive days without just cause.

117. The evidence presented by the Department is not sufficient to establish with the requisite degree of certainty that the work Challenger Pools did on Mr. Quadri's pool was below minimum industry standards. 8/

118. The evidence presented by the Department is sufficient to establish with the requisite degree of certainty that Challenger Pools began excavating Mr. Quadri's pool after it applied for the necessary permits but before they were issued. The Department presented no evidence to establish that

Challenger Pools proceeded with work on Mr. Quadri's pool without receiving the required inspections. In addition, Challenger Pools called for final inspections of the plumbing, electric, and structural components of the pool and closed out the permit on April 19, 1999.

119. As of October 6, 1999, the Department had expended \$1,088.47 in investigative costs and \$1,307.47 in prosecutorial costs with respect to Mr. Quadri's complaint.

#### CONCLUSIONS OF LAW

120. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and of the parties thereto pursuant to Sections 120.569 and 120.57(1), Florida Statutes (1999).

121. In its Administrative Complaints, the Department seeks to impose penalties against Mr. Esquinaldo that include suspension or revocation of his license and/or the imposition of an administrative fine. Therefore, it has the burden of proving by clear and convincing evidence that Mr. Esquinaldo committed the violations alleged in the Administrative Complaints.

Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern and Co., 670 So. 2d 932 (Fla. 1996); and Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

122. In Evans Packing Co. v. Department of Agriculture and Consumer Services, 550 So. 2d 112, 116, n. 5 (Fla. 1st DCA 1989), the court explained:

[C]lear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the evidence must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact the firm belief of conviction, without hesitancy, as to the truth of the allegations sought to be established. Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

123. Section 489.129(1), Florida Statutes (1997), 9/ provides in pertinent part:

489.129 Disciplinary proceedings.--  
(1) The board may take any of the following actions against any certificateholder or registrant: place on probation or reprimand the licensee, revoke, suspend, or deny the issuance or renewal of the certificate, registration, or certificate of authority, require financial restitution to a consumer for financial harm directly related to a violation of a provision of this part, impose an administrative fine not to exceed \$5,000 per violation, require continuing education, or assess costs associated with investigation and prosecution, if the contractor, financially responsible officer, or business organization for which the contractor is a primary qualifying agent, a financially responsible officer, or a secondary qualifying agent responsible under s. 489.1195 is found guilty of any of the following acts:

\* \* \*

(k) Abandoning a construction project in which the contractor is engaged or under contract as a contractor. A project may be presumed abandoned after 90 days if the contractor terminates the project without just cause or without proper notification to the owner, including the reason for termination, or fails to perform work without just cause for 90 consecutive days.

\* \* \*

(n) Committing incompetency or misconduct in the practice of contracting.

\* \* \*

(p) Proceeding on any job without obtaining applicable local building department permits and inspections.

124. In the Administrative Complaint in DOAH Case No. 98-3713, the Department alleged in Count I that Challenger Pools failed to perform work on Mr. Jovellar's swimming pool without just cause for a period of 90 consecutive days and, therefore, abandoned the construction of Mr. Jovellar's swimming pool, in violation of Section 489.129(1)(k), Florida Statutes (Supp. 1996). On the basis of the findings of fact herein, the evidence is clear and convincing that Challenger Pools is guilty of this violation. The Department dismissed Count II of the Administrative Complaint in DOAH Case No. 98-3713 at the hearing.

125. In the Administrative Complaint in DOAH Case No. 99-2654, the Department alleged in Count I that Challenger Pools failed to perform work on Mr. Casadona's swimming pool without just cause for a period of 90 consecutive days and, therefore, abandoned the construction of Mr. Casadona's swimming pool, in violation of Section 489.129(1)(k), Florida Statutes (Supp. 1996). On the basis of the findings of fact herein, the Department failed to prove by clear and convincing evidence that Challenger Pools is guilty of this violation. On the basis of the findings of fact herein, the failure of Challenger Pools to work on Mr. Casadona's pool from October 1997 through January 1999 was justified.

126. In the Administrative Complaint in DOAH Case No. 99-2654, the Department alleged in Count II that Challenger Pools failed to adhere to minimum industry standards in the practice of contracting and, therefore, committed incompetency in the practice of contracting, in violation of Section 489.129(1)(n), Florida Statutes (Supp. 1996). On the basis of the findings of fact herein, the Department failed to prove this charge by clear and convincing evidence. 10/

127. In the Administrative Complaint in DOAH Case No. 99-2654, the Department alleged in Count III that Challenger Pools "failed to obtain . . . the required passing final inspections" on Mr. Casadona's pool and, therefore, violated

Section 489.129(1)(p), Florida Statutes (Supp. 1996). On the basis of the findings of fact herein, the Department failed to prove the violation identified in Count III of the Administrative Complaint by clear and convincing evidence. 11/

128. In the Administrative Complaint in DOAH Case No. 99-2655, the Department alleged in Count I that Challenger Pools failed to perform work on Mr. Quadri's swimming pool without just cause for a period of 90 consecutive days and, therefore, abandoned the construction of Mr. Quadri's swimming pool, in violation of Section 489.129(1)(k), Florida Statutes (Supp. 1996). On the basis of the findings of fact herein, the evidence is clear and convincing that Challenger Pools is guilty of this violation.

129. In the Administrative Complaint in DOAH Case No. 99-2655, the Department alleged in Count II that Challenger Pools failed to adhere to minimum industry standards in the practice of contracting and, therefore, committed incompetency in the practice of contracting, in violation of Section 489.129(1)(n), Florida Statutes (Supp. 1996). On the basis of the findings of fact herein, the Department failed to prove this charge by clear and convincing evidence. 12/

130. In the Administrative Complaint in DOAH Case No. 99-2655, the Department alleged in Count III that Challenger Pools "failed to obtain . . . the required passing final inspections"

on Mr. Quadri's pool and, therefore, violated Section 489.129(1)(p), Florida Statutes (Supp. 1996). On the basis of the findings of fact herein, the Department failed to prove this charge by clear and convincing evidence. 13/

131. Rule 61G4-17.001, Florida Administrative Code, provides the range of penalties that may be imposed for violations of the various provisions of Section 489.129(1), Florida Statutes (1997), and provides in pertinent part:

The following guidelines shall be used in disciplinary cases, absent aggravating or mitigating circumstances and subject to other provisions of this Chapter.

\* \* \*

(11) 489.129(1)(k): Abandonment. First violation, \$500 to \$2,000 fine; repeat violation, revocation and \$5,000 fine.

\* \* \*

(19) For purposes of these guidelines, violations for which the Respondent has previously been issued a citation pursuant to Section 455.224, F.S., and rule 61G4-19.001, shall be considered repeat violations.

132. Rule 61G4-17.003, Florida Administrative Code, provides:

(1) As used in this rule, a repeat violation is any violation on which disciplinary action is being taken where the same licensee had previously had disciplinary action taken against him or received a letter of guidance in a prior case; and said definition is to apply



regardless of whether the violations in the present and prior disciplinary actions are of the same or different subsections of the disciplinary statutes.

(2) The penalty given in the above list [in Rule 61G4-17.001] for repeat violations is intended to apply only to situations where the repeat violation is of a different subsection of Chapter 489 than the first violation. Where, on the other hand, the repeat violation is the very same type of violation as the first violation, the penalty set out above will generally be increased over what is otherwise shown for repeat violations in the above list.

Based on the findings of facts herein, the Department has proven that Challenger Pools has received a citation for failing to obtain a final inspection. Therefore, the penalty ranges given in Rule 61G4-17.001, Florida Administrative Code, for repeat violations should be used in determining the appropriate penalties in this case.

133. Rule 61G4-17.002, Florida Administrative Code, sets forth the aggravating and mitigating circumstances that may be considered for the purposes of increasing or decreasing the penalty. The rule provides that the factors

shall include, but are not limited to, the following:

(1) Monetary or other damage to the licensee's customer, in any way associated with the violation, which damage the licensee has not relieved, as of the time the penalty is to be assessed. (This provision shall not be given effect to the extent it would contravene federal bankruptcy law.)

- (2) Actual job-site violations of building codes, or conditions exhibiting gross negligence, incompetence, or misconduct by the licensee, which have not been corrected as of the time the penalty is being assessed.
- (3) The severity of the offense.
- (4) The danger to the public.
- (5) The number of repetitions of offenses.
- (6) The number of complaints filed against the licensee.
- (7) The length of time the licensee has practiced.
- (8) The actual damage, physical or otherwise, to the licensee's customer.
- (9) The deterrent effect of the penalty imposed.
- (10) The effect of the penalty upon the licensee's livelihood.
- (11) Any efforts at rehabilitation.
- (12) Any other mitigating or aggravating circumstances.

134. The penalty guidelines and aggravating and mitigating factors have been evaluated in light of the facts found herein in determining the recommended penalty.

135. The recommendation by the Department that an administrative fine in the amount of \$2,500.00 be assessed for each violation of Section 489.129(1)(k), Florida Statutes (1997), is accepted as reasonable, as is the Department's recommendation that Mr. Esquinaldo's license be placed on probation rather than suspended or revoked.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED the Construction Industry Licensing Board enter a final order:

1. Finding that Challenger Pools violated Section 489.129(1)(k), Florida Statutes (1997), in DOAH Case No. 98-3713 and DOAH Case No. 99-2655;

2. Dismissing Count II of the Administrative Complaint in DOAH Case No. 98-3713;

3. Dismissing the Administrative Complaint in DOAH Case No. 99-2654;

4. Dismissing Counts II and III of the Administrative Complaint in DOAH Case No. 99-2655; and

5. Imposing the following penalties on Bruce E. Esquinaldo, Jr., as qualifier of Challenger Pools:

a. Assessing an administrative fine in the amount of \$2,500.00 in DOAH Case No. 98-3713 and in DOAH Case No. 99-2655 for the violations of Section 489.129(1)(k), Florida Statutes (1997), for a total administrative fine of \$5,000.00;

b. Placing Mr. Esquinaldo's license on probation for a period of one year, subject to such terms and conditions as the Board may impose; and

c. Assessing the costs of investigation and prosecution attributable to the violations of Section 489.129(1)(k), Florida

Statutes (1997), in DOAH Case No. 98-3713 and DOAH Case No. 99-2655.

DONE AND ENTERED this 27th day of June, 2000, in Tallahassee, Leon County, Florida.

---

PATRICIA HART MALONO  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 27th day of June, 2000.

#### ENDNOTES

<sup>1/</sup> E. Renee Alsobrook, Esquire, appeared for the Respondent at that portion of the hearing conducted on October 11 and 12, 1999. Ms. Alsobrook was permitted to withdraw as counsel for the Respondent by order entered January 4, 2000.

<sup>2/</sup> Mr. Jovellar obtained a loan to pay for the pool, and each of the checks issued to him was dated June 20, 1996. It is, therefore, not possible to know the dates the checks were actually written, so reference must be made to the processing dates on the back of the checks.

<sup>3/</sup> Once the pool has been plastered, a garden hose is placed in the pool and the pool is slowly filled with water. A day or so later, when the pool is filled, Challenger Pools' service technician delivers the pool cleaner, the pool pole, and the dip-net test kit. He turns on the pool pump, adds the chemicals, and instructs the homeowner in maintaining the pool.

<sup>4/</sup> On this point, the testimony of the Department's expert witness, Calvin Eden, is found to be unpersuasive.

<sup>5/</sup> The construction plans for the pool were not offered into evidence.

<sup>6/</sup> Because it was not noted in the inspection report that the grid was completely detached, it must be assumed that the grid was secured by at least one screw.

<sup>7/</sup> This requirement was subsequently removed from the South Florida Building Code.

<sup>8/</sup> On this point, the testimony of the Department's expert witness, Calvin Eden, is found to be unpersuasive.

<sup>9/</sup> The pertinent provisions of Section 489.129(1), Florida Statutes (1997), are identical to the pertinent provisions of Section 489.129(1), Florida Statutes (Supp. 1996).

<sup>10/</sup> Although Rule 61G4-17.001(14)(b), Florida Administrative Code, provides that a violation of Chapter 489, Florida Statutes, constitutes misconduct and incompetency, the Department did not cite this rule provision or plead this ground for finding Challenger Pools guilty of incompetence, nor did it raise this ground in its Proposed Recommended Order. Accordingly, Challenger Pools cannot be found guilty of a violation of Section 489.129(1)(n), Florida Statutes (1997), on the ground that it committed another violation of Chapter 489. See Sternberg v. Department of Professional Regulation, Board of Medical Examiners, 465 So. 2d 1324, 1325 (Fla. 1st DCA 1985); and Cottrill v. Department of Insurance, 685 So. 2d 1371 (Fla. 1st DCA 1996)(Even though an Administrative Complaint contains reference to a particular statutory violation, facts or conduct warranting disciplinary action must be alleged in the Administrative Complaint; the fact that evidence was introduced that "might well support a violation" does not provide basis for finding violation when the facts or conduct are not pled in the Administrative Complaint.). Cf. Maddox v. Department of Professional Regulation, 592 So. 2d 717, 720 (Fla. 1st DCA 1991)(Administrative Complaint contained sufficient allegations of the specific behavior and criteria charged to support violation).

<sup>11/</sup> Even though the evidence in this case was sufficient to establish that Challenger Pools began excavation of the pool before the local permits were issued, this evidence cannot provide a basis on which to find that Challenger Pools violated Section 489.129(1)(p), Florida Statutes (1997). Although a contractor violates Section 489.129(1)(p) if it proceeds with

construction without obtaining the required local permits, the Department did not plead this ground for finding Challenger Pools guilty of Section 489.129(1)(p), nor did it raise this ground in its Proposed Recommended Order. Accordingly, Challenger Pools cannot be found guilty of a violation of Section 489.129(1)(p), Florida Statutes (1997), on this ground. See Sternberg v. Department of Professional Regulation, Board of Medical Examiners, 465 So. 2d 1324, 1325 (Fla. 1st DCA 1985); cf. Maddox v. Department of Professional Regulation, 592 So. 2d 717, 720 (Fla. 1st DCA 1991)(The specific behavior and criteria charged must be made clear in the Administrative Complaint.)

<sup>12/</sup> See endnote 10, supra.

<sup>13/</sup> See endnote 11, supra.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.